## A. The Circuit Split Proffered by Petitioners Is Wholly Illusory.

### 1. No Circuit Court of Appeals Has Held that *Pioneer* Requires Attorney Neglect To Be Found Excusable if There Is No Prejudice, No Delay and No Bad Faith.

According to the Petition, certain circuits hold that an "attorney's neglect is excusable if there is no prejudice, no delay, and no bad faith." (Petition, at 9). This proposition is simply false.

To demonstrate the alleged "circuit split," Petitioners rely heavily on language from the Ninth Circuit's decision in *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004). That case, however, refutes the existence of a circuit split. In *Pincay*, an attorney at a "sophisticated law firm" with a "sophisticated system to determine and calendar filing deadlines" delegated responsibility for filing a notice of appeal to a paralegal. The paralegal believed the Federal Rules allowed for 60 days to file the notice, when the rule clearly states 30 days. *Id.* at 854-55.

The district court *granted* the motion to extend the filing deadline, but a panel of the Ninth Circuit reversed, holding that delegation of this duty to a paralegal was per se inexcusable. The Ninth Circuit sitting *en banc* subsequently reversed, holding that delegation to a paralegal is not *per se* inexcusable. *Id.* at 855.

More significantly to the instant case, the Ninth Circuit, in considering the larger question of the paralegal's misreading of the Federal Rules, held that the district court

had not abused its discretion in granting the extension of time. *Id.* at 860. In so holding, however, the court stated that the

> decision to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of the district court because the district court is in a better position than we are to evaluate factors such as whether the lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty mistakes, the quality of representation of the lawyers..., and the likelihood of injustice if the appeal was not allowed. *Had the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse.*

*Id.* at 859 (emphasis added). Accordingly, the Ninth Circuit interprets *Pioneer* to grant a district court wide latitude in applying the four-factor test to the particular facts and circumstances of a case. While the Ninth Circuit did state in dicta that "[t]he authorities interpreting *Pioneer* in a number of circuits are in some disarray," *id.* at 857, the exercise of discretion by the lower courts to reach different results under fact-specific applications of the *Pioneer* standard is no justification for granting the Petition in this case, particularly when the Ninth Circuit's decision is consistent with the Fourth Circuit's affording the District Court wide latitude in determining whether neglect is excusable. This kind of latitude is commonly afforded to district courts applying the *Pioneer* standard. *See United States v. Brown*, 133 F.3d 993, 997 (7th Cir. 1998) (stating that "[i]n a close case like this one, [where the attorney confused Wisconsin state rules of

procedure with the federal rules] we might affirm a district court that refused to exercise lenity").

Moreover, *Pincay* certainly does not stand for the proposition that attorney negligence should always be excused if there is no delay, no prejudice and no bad faith. Accordingly, nothing in *Pincay* indicates a "split" with the Fourth Circuit's decision in this case.

The fatal flaws in Petitioners' argument are also demonstrated by cases from other circuits. For example, Petitioners rely on *Robb v. Norfolk & W. Ry. Co.*, 122 F.3d 354 (7th Cir. 1997). In that case, after failing to notify the court of an agreement with opposing counsel to extend the time to file a response to a summary judgment motion, the movant sought relief under Fed. R. Civ. P. 60(b)(1) on the basis of excusable neglect. *Id.* at 356. The district court denied the motion, holding that attorney negligence can never be excusable. *Id.* at 357. The Seventh Circuit *reversed*, holding only that the district court possessed such discretion. *Id.* at 361 Significantly, the court of appeals noted that its decision was consonant with *Pioneer* and other cases interpreting it, including those decided by the Fourth Circuit. *Id.* at 362 (citing *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530 (4th Cir. 1996)). Evidently, the Seventh Circuit does not see a conflict with the Fourth Circuit.

As further evidence of the flaws in Petitioners' argument, Respondents note the Seventh Circuit's decision in *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132 (7th Cir. 1996). In that case, an attorney missed several deadlines and argued that, having been retained late in the case, he did not have sufficient time to meet the deadlines. The attorney also argued that he believed (erroneously) that the deadline

for filing the notice of appeal was tolled while the district court considered a motion to alter or amend the judgment. The attorney was also unaware that the 10-day deadline under Fed. R. Civ. P. 59(e) cannot be extended. *Id.* at 133. In rejecting the claim of excusable neglect, the Seventh Circuit stated, "[h]ere the rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused, but inexplicable. If there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect." *Id.* at 134.

Thus, in *Prizevoits*, the Seventh Circuit rejected an excusable neglect claim because the "reason for the delay" – the attorney's negligence – was simply inexcusable. Obviously, this decision does not conflict with *Robb* or the Fourth Circuit's decision in this case. To be sure, this Court's admonition that the concept of excusable neglect be treated as an "elastic concept" can, will and should result in courts reaching different conclusions under different sets of facts. This is demonstrated by other circuits that have found attorney neglect to be excusable in some cases and inexcusable in others. *Compare Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996) (finding excusable neglect where associate attorney asked his secretary to notify lead counsel of an impending deadline and secretary failed to do so), *with Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996 (11th Cir. 1997) (refusing to find excusable neglect when an attorney misread the time limit to file a motion for a new trial under Federal Rule of Civil Procedure 59).

### 2. No Circuit Court of Appeals Has Held that *Pioneer* Requires Attorney Neglect To Be Found Inexcusable Even if There Is No Prejudice, No Delay and No Bad Faith.

None of the cases cited by Petitioners as representing the "hard line" side of the circuit split apply the *per se* rule articulated in the Petition. In each of these cases, courts considered the *Pioneer* standard and four-factor test, and based on the facts and circumstances of the particular case, held that the reason for the delay was inexcusable. Nothing in *Pioneer* precludes such a finding. These cases include:

- *Graphic Comm'ns Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1 (1st Cir. 2001) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney mailed notice of appeal to co-counsel at the wrong address and where co-counsel still had sufficient time to file the notice of appeal in a timely fashion and failed to do so).

- *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2d Cir. 2003) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney relied on the representation of *opposing* counsel as the sole means of ascertaining the date on which the notice of appeal was due to be filed).

- *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530 (4th Cir. 1996) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney entrusted the filing of the notice of appeal to the vagaries of the U.S. Post Office, knowing that notices must be filed (not mailed) by the deadline in Rule 4).

- *McCurry v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586 (6th Cir. 2002) (declining to grant a Rule 60(b) motion where attorney made a "purely strategic, wholly deliberate decision" to name what turned out to be the wrong party in a wrongful death action under Tennessee law; citing *Pioneer* for the proposition that "clients must be held accountable for the acts and omissions of their attorneys").

- *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457 (8th Cir. 2000) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney did not comprehend how to count weekends in determining the deadline for filing a notice of appeal).

- *United States v. Torres*, 372 F.3d 1159 (10th Cir. 2004) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney in a criminal case confused the deadline for filing notices of appeal in criminal cases

> with the deadline for filing notices of appeal in civil cases).

In a futile attempt to bolster their contention that there is a circuit split, Petitioners categorize the Fourth Circuit's decision in *Thompson* as putting that court into a neat bucket of circuit courts of appeals that take a "hard line approach that an attorney's neglect is never excusable." (Petition, at 6). This contention is belied by the Petitioners' own brief in the court below, where they stated:

> However, contrary to the Chief Judge's decision, this Court [the Fourth Circuit] did not revive the pre-*Pioneer* standard that precluded relief if the reason for the delay was within the late filer's control and not extraordinary. *Thompson simply holds that repeating the same error that leads to a late filing is not excusable the second time around.*

Brief for Plaintiffs-Appellants, filed September 21, 2004 (emphasis added).

Contrary to Petitioners' strained characterizations, these cases stand for the common sense proposition that "there still must be a satisfactory explanation for the late filing." *Graphic Comm'ns*, 270 F.3d at 5; *accord Pioneer*, 507 U.S. at 395 (noting that attorney's "neglect" must also be "excusable"). No case holds that attorney neglect is never excusable under any circumstance.

In the absence of any discernible circuit split, the Petition must be viewed for what it really is: a thinly-veiled attempt to have this Court review the lower courts' decisions

based upon Petitioners' belief that certain courts, including the lower courts in this case, have *misapplied* Pioneer. Petitioners admit as much when they argue that this dispute concerns "how to *apply* the 'excusable neglect' standard." (Petition, at 8) (emphasis added).

The Rules of this Court could not be clearer on this point. "A petition for a writ of certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law." *See* Supreme Court Rule 10. This is particularly true in this case where Petitioners are asking the Court to review the fact-bound, case-specific holding of the District Court and Court of Appeals that the conduct of Petitioners' counsel was inexcusable under the circumstances.

Anticipating such an argument, Petitioners posit that the Fourth Circuit (and others adopting the so called "hard-line" *per se* rule) did not misapply *Pioneer*. (Petition, at 15). Instead, Petitioners assert that these courts are simply confused by the "conflicting dicta" in *Pioneer*, making this "a case requiring clarification of an earlier decision and ... not a case of the misapplication of a properly stated rule of law." (*Id.*). This is a red herring. As demonstrated above, the "clarification" that Petitioners seek is really a request for this Court to declare that *Pioneer* requires a district court to find all attorney neglect excusable so long as there is no delay, no prejudice and no bad faith. This is not a clarification. It would be an overruling of *Pioneer* and a wholesale revision of its standards.

Petitioners also argue that their proffered circuit split "cannot be swept away as the natural consequence of applying a multi-factored balancing test to varying sets of

facts." (Petition, at 6). To the contrary, the diverse opinions of the circuit courts are the inevitable result of *Pioneer*, in which this Court eschewed bright-line, *per se* rules and left to the discretion of the district courts the latitude to extend certain deadlines based upon the facts and circumstances of a particular case. Petitioners have offered the Court no good reason to turn back the clock on its excusable neglect jurisprudence and especially so in the context of an uncontested factual record which despite Petitioners' characterization does not present "a commonly recurring set of facts." (Petition, at 7).

### B. The Court of Appeals and District Court Properly Applied the *Pioneer* Standard to the Particular Facts and Circumstances of This Case.

In this case, Petitioners' Virginia counsel received an order from the District Court dismissing his client's case with prejudice. Virginia counsel did not inform his clients of the order, nor did he consult with his co-counsel in Alabama. He let pass the deadline to notice an appeal, which is unambiguous, not to mention "mandatory and jurisdictional." *See Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978). Furthermore, while the record does not disclose why, Petitioners' Alabama counsel made no inquiries about the status of the case until at least 46 days after the order had been entered and months after the oral argument. In other words, Petitioners' counsel had *no excuse* for the late filing and the District Court found accordingly.

Thus, it was perfectly reasonable and within the discretion of the District Court to conclude, as it did, that the

lack of any "reason for the delay" outweighed the fact that the other *Pioneer* factors favored Petitioners. There is no language in *Pioneer* that suggests this result was improper. For this reason, the Petition for Certiorari should be denied.

### C. Strong Public Policy Considerations and the Effective Administration of Justice Favor Rejection of the *Per Se* Rule Advocated by Petitioners.

Petitioners should not be awarded certiorari so they can argue to this Court that all attorney neglect must be treated as excusable if there is no delay, no prejudice and no bad faith. Petitioners offered such a scant record below of their procedures, conduct, and "protocol," together with a complete absence of extenuating circumstances, that only such a *per se* rule would justify reversal of the Court of Appeals in this case. The adoption of such a rule, which at bottom is the only way in which Petitioners could revive their lawsuit, would be tantamount to engrafting an automatic 30-day extension to the time limit in Rule 4(a)(1)(A). Under such a scenario, "the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced." *Silivanch*, 333 F.3d at 368. The rule that Petitioners propose is simply a bad idea, devoid of logic and fraught with peril for lawyers and judges alike. It should be rejected.

## Conclusion

For the foregoing reasons, Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

Anne Marie Whittemore, Esq.
Elizabeth F. Edwards, Esq.
Brian E. Pumphrey, Esq.
McGuireWoods LLP
*Counsel for Crown Central LLC, Stanley A. Hoffberger, Barry L. Miller, Frank B. Rosenberg, Henry A. Rosenberg, Jr. and John E. Wheeler, Jr.*
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000

Richard L. Brusca, Esq.
Joseph L. Barloon, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
*Counsel for Michael F. Dacey, Jack Africk and Reverend Harold Ridley, S.J.*
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000

Jonathan L. Greenblatt, Esq.
Neil H. Koslowe, Esq.
Shearman & Sterling
*Counsel for Rosemore, Inc.*
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2604
(202) 508-8070

Lawrence Portnoy, Esq.
Kimberley D. Harris, Esq.
Paul M. Spagnoletti, Esq.
Davis, Polk & Wardwell
*Counsel for Credit Suisse First Boston Corporation*
450 Lexington Avenue
New York, New York 10017
(212) 450-4874

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No. 05-342

# In the
# Supreme Court of the United States

JAMES J. HAYES, on behalf of himself and all others similarly situated, and THOMAS BOOTS, on behalf of himself and all others similarly situated,

Petitioners,

- v. -

CROWN CENTRAL LLC, MICHAEL F. DACEY, STANLEY A. HOFFBERGER, BARRY L. MILLER, FRANK B. ROSENBERG, HENRY A. ROSENBERG, JR., JOHN E. WHEELER, JR., JACK AFRICK, HAROLD RIDLEY, CREDIT SUISSE FIRST BOSTON CORPORATION and ROSEMORE, INC.,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## REPLY TO BRIEF IN OPPOSITION

Timothy D. Battin, Esq.
Ian Otto, Esq.
STRAUS & BOIES, LLP
*Counsel for Petitioners*
10513 Braddock Road
Fairfax, Virginia 22032
(703) 764-8700

Edward M. Selfe, Esq.*
Nathan A. Forrester, Esq.
BRADLEY ARANT ROSE & WHITE LLP
*Counsel for Petitioners*
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104
(205) 521-8000

*Counsel of Record

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## ARGUMENT

### 1. The Second Circuit acknowledges the conflict in the Circuits

In the recently decided case of In re Enron Corp., 419 F.3d 115 (2d Cir. 8-16-05), the Second Circuit said it had "taken a hard line" on Pioneer Investments v. Brunswick, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), and acknowledged the conflict between it and the Ninth Circuit decision in Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004). The Second Circuit said:

> But see Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004) (en banc) (applying flexible reading of Pioneer and affirming trial court's decision to allow late-filed notice of appeal based on excusable neglect consisting of paralegal's misreading of the rule governing the deadlines for appeal), cert. denied, __ U.S. __, 125 S. Ct. 1726, 161 L. Ed. 2d 602 (2005); In re 50-Off Stores, Inc., 220 B.R. 897, 901 (Bankr. W.D. Tex. 1998) (noting that in conducting the Pioneer analysis, "[n]o single circumstance controls, nor is a court to simply proceed down a checklist ticking off traits. Instead, courts are to look for a synergy of several factors that conspire to push the analysis one way or the other"); In re Sacred Heart Hosp. of Norristown, 186 B.R. 891, 895 (Bankr. E.D. Pa. 1995) ("[A] long and logically unjustified delay which nevertheless has no significant impact on the debtor's case should . . . often be deemed excusable.").

419 F.3d at 124.

There is a clear and distinct conflict between those circuits that have adopted a hard line in applying the Pioneer test and those circuits which give effect to the equitable concepts of no prejudice, no delay and no bad faith. Compare Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 368 (2d Cir. 2003), cert. denied sub nom Essef

Corp. v. Silivanch, 540 U.S. 1105, 124 S. Ct. 1047, 157 L. Ed. 2d 890 (2004), with the Third Circuit decision in George Harms Constr. Co., Inc. v. Chao, 371 F.3d 156, 164 (3d Cir. 2004), and the Eleventh Circuit decision in Cheney v. Anchor Glass Container Corporation, 71 F.3d 848, 850 (11th Cir. 1996).

Contrary to the respondents' brief at page 7, the Third and Eleventh Circuits have held that Pioneer requires attorney neglect to be excused if there is no prejudice, no delay and no bad faith. George Harms Constr. Co., Inc., supra; Cheney v. Anchor Glass Container Corp., supra. Contrary to the respondents' brief at page 11, the Second and Tenth Circuits have held that Pioneer requires that attorney neglect be held not excusable even if there is no prejudice, no delay and no bad faith. Silivanch v. Celebrity Cruises, Inc., supra; U.S. v. Torres, 372 F.3d 1159 (10th Cir. 2004).

Nowhere in their opposition brief do the respondents acknowledge or deal with the statement in Pioneer that:

> . . . the lack of any prejudice to the debtor or to the interests of efficient judicial administration combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.

507 U.S. at 397-8, 123 L. Ed. 2d at 91. In the instant case, the Magistrate Judge established that there was no prejudice, no delay in the proceedings and no bad faith, and granted the motion to extend the time to file the notice of appeal. In overruling the Magistrate Judge, the Chief Judge said these factors had no significance (Pet. App. A-7), and the Court of Appeals upheld the Chief Judge in holding that these factors had no significance.

**2. Neglect is neglect, and there is no rational way to distinguish between different types of attorney neglect.**

The respondents argue at page 10 of their brief that excusable neglect is an elastic concept which may result in the same circuit finding attorney neglect to be excusable in some cases

and not in others. The respondents contend that it is appropriate for a court to hold that one type of attorney neglect is excusable and another type of attorney neglect is not excusable. That is not a rational or reasonable application of the concept of excusable neglect. Neglect is neglect and should be excusable if it is harmless, and should not be excusable if it causes prejudice or delay or constitutes bad faith. The huge volume of litigation involving excusable neglect would be greatly reduced if differences in types of neglect were ignored, and the only issues are whether there is prejudice, delay or bad faith. A district court may exercise its discretion in analyzing those equitable concepts.

Respondents argue at page 10 of their brief that the concept of excusable neglect "can, will and should" result in different results under different sets of fact. Misreading a procedural rule, miscalculating the applicable number of days or miscommunication among attorneys are to be treated differently, according to respondents. It is highly doubtful that Pioneer supports such a concept of excusable neglect, but if it does, Pioneer should be clarified. An attorney's good faith, harmless mistake should be excused whether the mistake is misreading a rule, miscalculating periods of time or failing to communicate among attorneys.

### 3. The conflict between those circuits which give effect to the Pioneer equitable factors and those circuits that do not should be resolved.

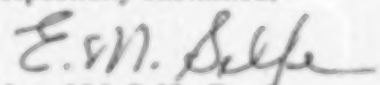
The respondents argue at page 11-12 of their brief that the hard line circuits consider all four factors of the Pioneer test. In fact, these circuits do not and are only concerned with the reason for the late filing. If that reason is attorney neglect, it is not excusable. See the extensive discussion of this issue by the Second Circuit in Enron, 419 F.3d at 122-3. The hard line circuits are offended by attorney neglect and will not consider the equitable factors of no prejudice, no delay and no bad faith. The no harm – no fault circuits acknowledge that mistakes are made and do give effect to the equitable factors of no prejudice, no delay and no bad faith. This conflict in the circuits will not be resolved by further litigation in the lower courts, and it should be resolved

by this Court. For the reasons stated in the petition, the record in this case permits the Court to do so.

## CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,



Timothy D. Battin, Esq.
Ian Otto, Esq.
STRAUS & BOIES, LLP
*Counsel for Petitioners*
10513 Braddock Road
Fairfax, Virginia 22032
(703) 764-8700

Edward M. Selfe, Esq.*
Nathan A. Forrester, Esq.
BRADLEY ARANT ROSE & WHITE LLP
*Counsel for Petitioners*
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104
(205) 521-8000

*Counsel of Record